STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2007
v	No. 265230 Lenawee Circuit Court
ISSAC DECRAIS HARRIS, Defendant-Appellant.	LC No. 05-011398

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of carrying a weapon with unlawful intent, MCL 750.226, assault with intent to rob while armed, MCL 750.89, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as an habitual offender, second, MCL 769.10, to concurrent terms of 28 to 90 months' imprisonment for carrying a weapon with unlawful intent, 168 to 360 months for assault with intent to rob while armed, 168 to 360 months for armed robbery, and a consecutive term of two years' imprisonment for the felony-firearm conviction. Because we conclude that defendant's assault with intent to rob while armed conviction violates double jeopardy, we vacate that conviction and sentence, but we affirm in all other respects.

I

Defendant's convictions stem from a robbery on September 20, 2004, at approximately 11:45 p.m., at a Clark gas station in Adrian in which a lone male entered the station pointing a gun and demanded money from the cashier Steven Luce, who was alone in the station. The robber escaped with between $250 and $300 in cash from the register. There were no eyewitnesses to the robbery; however, several surveillance cameras in the station recorded the events.

According to Luce,[1] an armed man, whom Luce later identified as defendant, opened the door to the gas station and pointed a gun at him. Luce testified that defendant told him to "[p]ut your hands up," and then ordered him to open the cash register and remove the money from it. Luce removed the money from the register and placed it on the counter. Defendant then instructed Luce to open the safe, but Luce was unable to open it. Defendant next told Luce to open the lottery machine, and Luce complied. However, there was no money in it, and Luce told defendant that the lottery money was kept in the cash register. Finally, defendant told Luce to "walk around back…towards the corner where the . . . Pepsi cooler is." Luce knelt there until he did not see movement in the store, and then called 9-1-1.

In addition to Luce's testimony identifying defendant as the robber, an acquaintance of defendant's, Theresa Stegg, testified at trial and positively identified defendant as the robber in the surveillance video. Defendant testified and admitted that the robber in the video looked like him, but defendant denied any involvement in the robbery. He testified that he was in Adrian earlier in the evening with his girlfriend, Melissa Moore, but that they left around 9:00 or 10:00 p.m. to go to Detroit, where they stayed for the night.

II

Defendant argues that his conviction of both armed robbery and assault with intent to rob while armed violates double jeopardy protections against multiple punishments for the same offense. Defendant failed to preserve this issue for appeal by raising it before the trial court. This Court reviews an unpreserved double jeopardy challenge for plain error affecting substantial rights. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). Reversal is appropriate only if such error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

The federal and Michigan double jeopardy provisions prohibit multiple punishments for the same offense to protect a defendant from being sentenced to more punishment than the Legislature intended. *People v Ford*, 262 Mich App 443, 447-448; 687 NW2d 119 (2004). This Court has previously determined that assault with intent to rob while armed[2] is a necessarily included lesser offense of armed robbery[3] and, therefore, dual convictions of these offenses for a

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[1] Luce was unavailable to testify at trial; however, his preliminary examination testimony was admitted into evidence at trial.

[2] "'The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed.'" *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003) (citations omitted).

[3] The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's person or presence, (3) while the defendant possesses a dangerous weapon as described in the statute, or so represents. MCL 750.529; *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *Ford*, *supra* at 458.

single criminal episode is a violation of double jeopardy protections.[4] *People v Yarbrough*, 107 Mich App 332, 335-336; 309 NW2d 602 (1981); *People v Johnson*, 90 Mich App 415, 421; 282 NW2d 340 (1979); see also *People v Wilder*, 411 Mich 328, 342-347; 308 NW2d 112 (1981) (where one offense is a necessarily included lesser offense of the other, conviction of and sentence for both violates double jeopardy protections against imposing double punishment for a single criminal act, absent legislative intent to the contrary). Accordingly, we agree with defendant that his convictions of assault with intent to rob while armed and armed robbery are contrary to double jeopardy provisions against multiple punishments for the same offense.

Plaintiff argues that under the circumstances of this case, there is no double jeopardy violation because the record shows that defendant completed the armed robbery by the stealing of the money from the cash register and then defendant committed the second offense, the assault, by ordering the victim at gun point to open the safe, which the victim was unable to do. "'[T]here is no violation of double jeopardy protections if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other.'" *People v Colon,* 250 Mich App 59, 63; 644 NW2d 790 (2000), quoting *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995); see also *Ford, supra* at 459.

We find plaintiff's argument unavailing. The circumstances of this case indicate that the events were part of a single criminal episode, i.e., the robbery of a single victim. See *Yarbrough, supra* at 335 (the complainant was the victim of a continuing assault during an armed robbery). We find no basis for demarcating the "armed robbery" from the purported separate assault merely on the basis defendant sought money from the safe at gunpoint after he forced the cashier at gunpoint to give him the money from the cash register. "[A]n assault should be punished as an offense separate from armed robbery only where it can clearly be established that the offenses occurred at separate times" because the Legislature did not intend to punish these offenses separately. *Id*. at 335-336.

The remedy for a double jeopardy violation involving multiple punishments is to affirm the greater offense and vacate the conviction for the lesser offense. *Meshell, supra* at 633-634; see also *People v Herron,* 464 Mich 593, 609; 628 NW2d 528 (2001). We therefore vacate

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[4] Although the armed robbery statute was amended in 2004 to change the definition of armed robbery, and the amended version applies in this case, neither party argues that the amendment affects this Court's previous determination that dual convictions of assault with intent to rob while armed, and armed robbery, for a single criminal episode is a violation of double jeopardy protections. See MCL 750.529; 2004 PA 128. We therefore do not address this issue. We note, however, that the amendment codified the "transactional approach" to robbery, under which "'a defendant has not completed a robbery until he has escaped with stolen merchandise. Thus, a completed larceny may be elevated to a robbery if the defendant uses force after the taking and before reaching temporary safety.'" *People v Morson*, 471 Mich 248, 264-265; 685 NW2d 203 (2004) (Corrigan, C.J., concurring), quoting *People v Randolph*, 466 Mich 532, 535; 648 NW2d 164 (2002) (citations omitted).

defendant's conviction of assault with intent to rob while armed, and remand for correction of the judgment of sentence.

III

Defendant argues that his constitutional right of confrontation was violated by the admission of an out-of-court statement made by a nontestifying witness, and thus, his convictions must be reversed. Defendant failed to preserve this issue for appeal. We review an unpreserved claim of constitutional error for plain error affecting defendant's substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). "To avoid forfeiture under the plain error rule, a defendant must show actual prejudice." *Id*.

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citations omitted).]

We find no error requiring reversal.

Police officers found a glove in the trunk of Moore's vehicle. Moore's father told the officers he gave the gloves to his daughter, but that defendant usually wore them when working on the vehicles. During the trial, there was testimony concerning Moore's father's statement. Defendant contends that the admission of Moore's father's out-of-court statement to the officers was a violation of his constitutional right to confrontation.

Plaintiff argues that because the testimony at issue was volunteered at trial by the witness, was not the result of any police interrogation, and related only to a glove circumstantially linking defendant to the robbery, there was no plain error. Further, defendant elicited similar testimony concerning the glove during cross-examination, and thus, any error was waived.

We agree that defendant waived any allegation of error by pursuing his own line of questioning concerning the glove. The intentional relinquishment or abandonment of a known right constitutes waiver, which extinguishes any error on appeal. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

But even assuming error, and that such error was not waived, we nevertheless find no basis for reversal because any error was harmless. The erroneous admission of Moore's father's out-of-court statement was unlikely to have been outcome determinative in light of the strong evidence of guilt. In this case, there was ample additional evidence linking defendant to the robbery of the gas station. Most importantly, Stegg unequivocally identified defendant as the armed man in the surveillance video taken during the robbery. In addition, defendant was arrested about eight blocks from the robbery scene, at a residence owned by Moore's father. In a search of the apartment above the garage, where defendant resided on occasion, the police found bullets that Moore told the detectives belonged to defendant. Testimony at trial indicated that the bullets matched the handgun used by the perpetrator of the robbery of the gas station, as seen on the surveillance video. Further testimony and other evidence showed that defendant possessed at least two pairs of athletic shoes with Velcro straps, one of which he was wearing at the time of the stop, and that he occasionally wore the shoes with the straps unfastened. On the surveillance video, it appeared that the armed robber wore shoes consistent with that description. Defendant has failed to show that he was prejudiced by any alleged error in the admission of testimony concerning the glove.

IV

Defendant argues that he was denied his right to a fair trial by three instances of prosecutorial misconduct. We agree that the prosecutor engaged in misconduct. Nonetheless, under the circumstances of this case, we find no error requiring reversal.

Defendant failed to object to the prosecutor's conduct below. This Court reviews unpreserved claims of constitutional error for plain error affecting substantial rights. *Carines*, *supra* at 763. No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

A

Defendant argues that the prosecutor committed misconduct in forcing defendant to comment on the credibility of prosecution witnesses. Defendant contends that the prosecutor badgered defendant by continually questioning him regarding his opinion of the truthfulness of the prosecution witnesses' testimony. During cross-examination, the prosecutor questioned defendant with regard to whether the police officers were lying in their testimony. Defendant answered that they were.

Generally, it is improper for the prosecutor to ask a defendant to comment on the credibility of prosecution witnesses. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). In this case, the prosecutor committed misconduct when he questioned defendant regarding the credibility of the police witnesses. Defendant's opinion of the witnesses' credibility is not probative of the matter. *Id*. Accordingly, the prosecutor's questions to defendant asking him to address the credibility of police witnesses constituted plain error.

However, as noted above, unpreserved plain error does not require automatic reversal by this Court. *Carines*, *supra* at 763. "Reversal is warranted only when plain error resulted in the

conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). "[W]here a curative instruction could have alleviated any prejudicial effect," this Court "will not find error requiring reversal." *Id.* at 449.

Defendant has not demonstrated how he was prejudiced by the prosecutor's conduct. Defendant does not argue that the prosecutor's questioning resulted in the conviction of an actually innocent man or affected the public reputation of judicial proceedings. As discussed above, there was positive evidence of defendant's guilt adduced at trial. Moreover, a timely objection by defense counsel could have cured any prejudice. Consequently, reversal is unwarranted.

B

Defendant argues that the prosecutor improperly cross-examined defendant about his employment status and how he supported himself prior to his arrest. He contends that this line of questioning was harmful and unfairly prejudicial, and denied defendant his due process right to a fair trial.

The prosecutor's questions regarding defendant's employment status were improper. In general, "[w]hether [a] defendant … was poor or unemployed is legally irrelevant to the issue of guilt or innocence." *People v Andrews*, 88 Mich App 115, 118; 276 NW2d 867 (1979). Therefore, it is usually improper for a prosecutor to make reference to a defendant's unemployment or poverty for the purpose of proving motive, or for character assassination, or credibility. *People v Johnson*, 393 Mich 488, 496-498; 227 NW2d 523 (1975); *Andrews*, *supra* at 118-119. Our Supreme Court has stated:

> Evidence of poverty, dependence on public welfare, unemployment, underemployment, low paying or marginal employment, is not ordinarily admissible to show motive. The probative value of such evidence is diminished because it applies to too large a segment of the total population. Its prejudicial impact, though, is high. There is a risk that it will cause jurors to view a defendant as a "bad man"—a poor provider, a worthless individual. [*People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980) (citations omitted).]

Despite the prejudicial nature of the subject matter, we find reversal unwarranted in this case. The focus on defendant's employment status was brief, and defendant responded appropriately, indicating that he had been recently employed and working on the side doing "customizing." Defendant has not demonstrated that the prosecutor's improper conduct was outcome determinative. As discussed above, there was strong evidence at trial of defendant's guilt. And we cannot conclude that the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence. Further, any danger that the jurors might have drawn improper inferences from the prosecutor's line of questioning could have been sufficiently cured by a timely objection and curative instruction.

C

Defendant argues that he was denied a fair trial by the prosecutor's misconduct when in rebuttal argument he improperly appealed to the jury's civic duty to make the streets and community safe. We agree that the prosecutor's comments were improper.

At the close of his rebuttal argument, the prosecutor stated:

> I don't want [defendant] to have that opportunity again. It is time to take some steps to get this street safe, this community safe. And we don't want [defendant] to have that opportunity to do this again. And if he was to do it again maybe he would and if he did maybe he will pull the trigger the next time. Thank you.

Generally, it is inappropriate for a prosecutor to "resort to civic duty arguments that appeal to the fears and prejudices of jury members . . . ." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). In general, a civic duty argument injects issues into the jury's deliberations that are broader than defendant's guilt or innocence of the charges. *Bahoda, supra* at 284; *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005).

The prosecutor's closing statement constituted an improper appeal to the jury's civic duty. By telling the jury that it should convict defendant of the charges against him because it would increase the safety of the streets and community and prevent defendant from having the opportunity to commit another crime, the prosecutor introduced issues into the jury's deliberations that were irrelevant to defendant's guilt or innocence of the particular crimes with which he was charged. The effect of the prosecutor's statements was to argue that the jury had a civic duty to convict defendant.

Nonetheless, the reversal of defendant's convictions is unwarranted. Any prejudicial effect could have been cured by a timely objection and appropriate instruction. In light of the strong evidence of guilt, as discussed above, defendant has failed to show the requisite prejudice. Further, defendant has not demonstrated that the prosecutor's argument resulted in the conviction of an actually innocent man or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence.

V

Defendant argues that he was denied his constitutional right to effective assistance of counsel on several grounds, including (1) counsel's failure to challenge the in-court identification of defendant by Luce; and (2) his failure to object to defendant's convictions on double jeopardy grounds; the improper testimonial evidence admitted at trial; the prosecutor's objectionable cross-examination of defendant on the issues of the credibility of witnesses and his employment status; and the prosecutor's improper appeal to the jury's civic duty.

This Court granted defendant's motion to remand to determine whether defendant was denied the effective assistance of counsel. Therefore, this is a preserved constitutional issue. *People v LeBlanc*, 465 Mich 575, 577, 579; 640 NW2d 246 (2002). "Whether a person has been

denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* at 579. This Court reviews the trial court's findings of fact for clear error. *Id*. This Court reviews de novo questions of constitutional law. *Id*.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court reiterated the test for ineffective assistance of counsel:

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 674 (1984). . . . "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. "Second, the defendant must show that the deficient performance prejudiced the defense." To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [Citations omitted.]

Defendant has not overcome the strong presumption of trial strategy or otherwise established that counsel's performance was deficient with regard to any of the alleged errors by trial counsel. Even if counsel's performance was deficient, defendant has failed to show that he was prejudiced.

First, defendant argues that the failure of his trial attorney to move to suppress the in-court identification of defendant by Luce during the preliminary examination constituted ineffective assistance of counsel. As noted above, Luce's preliminary examination testimony was read to the jury because Luce was unavailable to testify at trial.

Generally, the decision to move to suppress an in-court identification is a matter of trial strategy. *People v Carr*, 141 Mich App 442, 452; 367 NW2d 407 (1985). "This Court will not substitute its judgment for that of defense counsel in matters of trial strategy." *Id*. Defendant has failed to overcome the presumption that trial counsel's performance constituted sound trial strategy.

The record shows that defense counsel actively cross-examined Luce concerning the quality of his memory and whether he was "100 per cent" positive that defendant was the man who robbed him. Moreover, trial counsel was able to successfully exploit the equivocation in Luce's identification, compelling him to repeat his testimony that defendant merely "looks like"

the armed robber. Therefore, trial counsel's failure to move to suppress Luce's in-court identification did not constitute ineffective assistance of counsel.

In any event, defendant has failed to demonstrate that there is a reasonable probability that the outcome of the trial would have been different absent the alleged deficient performance. The central issue in this case was the identification of defendant as the armed robber. There was ample evidence absent Luce's in-court identification to convict defendant of the crimes with which he was charged, including Stegg's positive identification of defendant as the robber, the surveillance video of the crime, and the evidence found at Moore's residence. Defendant has failed to show that he was prejudiced by any deficient performance.

Defendant also contends that he was denied the effective assistance of trial counsel when counsel failed to object to (1) defendant's conviction on double jeopardy grounds, (2) the testimonial hearsay evidence from Moore's father, (3) the prosecutor's improper cross-examination of defendant about the credibility of the police witnesses and his employment status, and (4) the prosecutor's improper appeal to the jurors' civic duty to convict during his rebuttal closing argument.

Regarding these remaining claims of ineffective assistance based on the errors discussed above, we find no error requiring reversal. Trial counsel was not ineffective for failing to object to the admission of the out-of-court statements about the gloves made by Moore's father. At the evidentiary hearing on remand, trial counsel testified that he did not object to Officer Grayer's testimony about the gloves because he expected Moore to testify that although defendant wore gloves when he worked on her car, they were not the same gloves that were in the courtroom. Trial counsel explained that Moore's anticipated testimony would have been consistent with defendant's testimony that he wore purple gloves when he worked on the car, and not the blue glove that was shown to the jury. *Id.* With the benefit of hindsight, it appears that this strategy was unsuccessful because Moore did not testify. Nonetheless, counsel was not ineffective for failing to object to the testimony. Counsel's decisions with regard to this matter involved trial strategy, and defendant has not overcome the presumption of sound strategy. Ineffective assistance of counsel will not be found merely because a strategy did not work. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Finally, trial counsel was not ineffective for failing to object to multiple instances of prosecutorial misconduct. At the evidentiary hearing, counsel explained his reasons for failing to object to the alleged misconduct, indicating that he did not want to draw unnecessary attention to these matters, and the issues were otherwise secondary. Defendant has not overcome the presumption that the decisions made by trial counsel constituted sound trial strategy.

Defense counsel explained that, in his opinion, "this case boiled down to whether or not the jury believed that that was [defendant] that was in the video." Therefore, his defense strategy was "that it was not [defendant] in the video tape, that he didn't commit the armed robbery." In furtherance of this defense, counsel chose not to "draw unnecessary attention" to matters that he viewed as not critical to the central issue of whether it was defendant in the surveillance video.

"This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Defendant has not demonstrated that trial counsel's performance was deficient. Moreover, as discussed above, there was strong evidence of defendant's guilt adduced at trial. Therefore, even if counsel's performance were deficient, there was not a reasonable probability that the deficiency prejudiced defendant.

We vacate defendant's conviction and sentence for assault with intent to rob while armed and remand for correction of the judgment of sentence. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ Helene N. White